

Fair Housing And Criminal History



FAQ

The Fair Employment and Housing Act prohibits discrimination against tenants or homeowners based on various protected characteristics, such as race, national origin, ancestry, disability, sexual orientation, marital status, and gender identity

Housing providers sometimes check whether a person has a criminal history when making a housing decision, such as whether to rent to an individual. While providers have legitimate interests in screening potential tenants to determine if they can fulfill their obligations as tenants, individuals with criminal histories face barriers to housing even when their history bears no relationship to their ability to be responsible tenants.

New regulations from the Department of Fair Employment and Housing (DFEH) address when and how housing providers may lawfully consider criminal histories, in order to protect against unlawful discrimination. DFEH is providing this guidance concerning the use of criminal history by providers or operators of housing.

1 | Which California laws apply to the use of criminal history by housing providers?

California's Fair Employment and Housing Act (FEHA) protects people from [housing discrimination](#) based on protected characteristics including race, color, national origin, religion, disability, gender, gender identity, familial status, veteran/military status, sexual orientation, and source of income. Most housing providers are also covered by the Unruh Act, which prohibits discrimination on the basis of immigration status, citizenship, and primary language, among others. Having a criminal history is not in itself a protected characteristic under FEHA or the Unruh Act. However, regulations that went into effect on January 1, 2020 implement FEHA with respect to the use of criminal history in housing (California Code of Regulations, Title 2, Sections 12264-12271).

2 | When does a housing provider violate California law if they consider someone's criminal history?

A housing provider's policy or practice regarding criminal history will violate California law when it has an unjustified discriminatory effect on members of a protected class, even when the provider had no intent to discriminate. In California as in the rest of the nation, African Americans, Hispanics (or Latinos), and certain other groups face higher rates of arrest, conviction, and incarceration than the general population. The use of criminal history information in housing decisions can therefore have a disproportionate negative affect on these protected groups.

In addition, a housing provider's policy or practice regarding criminal history will violate California law if it constitutes intentional discrimination on the basis of a protected characteristic. For example, it is unlawful for housing providers to: use criminal history screenings to intentionally exclude individuals because of their race, only run criminal history screenings on certain racial groups, or treat individuals in different racial groups differently based on comparable criminal history information.

Additional information relevant to this question are provided in the FAQs below and the regulations.

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3 | Who must comply with California's fair housing laws?

- Landlords
- Property management companies
- Homeowners associations
- Public housing authorities
- Real estate agents
- Home sellers
- Property insurers
- Builders
- Mortgage lenders
- Tenant screening companies
- Consumer reporting agencies
- Others

4 | Can a housing provider advertise or indicate a blanket ban against applicants with criminal records?

No. Housing providers cannot make any statement indicating a blanket ban on renting to anyone with a criminal record. The law prohibits advertisements, screening policies (oral or written), or statements with blanket bans such as “No Felons” or “We Don’t Allow Criminals Here.” However, it is not unlawful for a housing provider to advertise or state that it will run a lawful criminal history check.

5 | May a housing provider lawfully check an applicant's criminal history?

Yes. Generally, a housing provider may check the criminal history of an applicant, although there are some types of criminal history information that providers may not seek or consider (see FAQ 6 below). If a housing provider intends to deny someone housing (or otherwise take an adverse action against someone) it must be based on a past criminal conviction. And, the law requires the provider to follow certain guidelines, which are set forth in the regulations (see FAQ 7 below). Most importantly, the conviction the provider is concerned about must be a “directly-related conviction.” This means a criminal conviction that has a direct and specific negative bearing on a substantial, legitimate, and nondiscriminatory interest or purpose of the housing provider, such as the safety of other residents, the housing provider's employees, or the property.

In determining whether a criminal conviction is directly-related, a housing provider should consider the nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred. For example, a ten-year-old misdemeanor conviction for a driving offense would not likely be directly-related to fulfilling financial obligations because there is no rational relationship between the violation and the identified business interest. In contrast, a recent criminal conviction for residential arson could be directly-related to the risk that an individual may injure other residents or property because there is a rational relationship between recently committing residential arson and injuring residents or property.

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6 | **What types of criminal history information are a housing provider prohibited from considering?**

It is unlawful for a housing provider to seek or consider the following:

- Arrests that did not lead to a conviction;
- Information indicating that an individual has been questioned, apprehended, taken into custody, detained, or held for investigation by law enforcement;
- Infractions;
- Referral to or participation in a pre-trial or post-trial diversion program or a deferred entry of judgment program, unless the applicant offered this information as mitigating information (see FAQ 8 below);
- Criminal convictions that have been sealed, dismissed, expunged, or otherwise rendered legally inoperative, unless the applicant offered this information as mitigating information (see FAQ 8 below); or
- Adjudications or matters processed in the juvenile justice system, unless pursuant to an applicable court order or unless the applicant offered this information as mitigating information (see FAQ 8 below).

7 | **If a housing provider would like to consider criminal history information (aside from the prohibited information detailed in FAQ 6 above), what should the provider's policy or practice look like?**

A housing provider may consider certain criminal history, but the provider's policy or practice should:

- Be narrowly tailored and focus on whether any criminal conviction is “directly-related” (see FAQ 5 above);
- Provide an opportunity for applicants to present individualized, mitigating information either in writing or in person if the housing provider is concerned about an applicant's past conviction;
- Provide written notice of the opportunity to all applicants to present mitigating information if a housing provider is concerned about a past conviction;
- Consider the factual accuracy of the criminal history information of the applicant, meaning the background report does not contain outdated, incorrect, or falsified information or information that is erroneously attributed to the individual being considered;
- Delay seeking, considering, or using a third-party report of criminal history information until after an individual's financial and other qualifications are verified;
- Provide a copy or description of the criminal history background check policy to an applicant upon request; and
- Consider mitigating information in determining whether to rent to an applicant with a past criminal conviction.

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8 | What is mitigating information?

Housing providers should consider mitigating information when considering an applicant's criminal history. Mitigating information means credible information about the applicant that suggests that the applicant is not likely to pose a demonstrable risk to the health and safety of others, the property, or other substantial, legitimate, and non-discriminatory interest or purpose of the housing provider. Mitigating information must be credible information that a reasonable person would believe is true based on the source and content of the information.

Mitigation information includes but is not limited to:

- The age of the individual when the criminal conduct occurred;
- The amount of time that has passed since the date of conviction;
- Whether the conduct arose as a result of a disability;
- Whether the conduct arose from status as a survivor of domestic violence;
- Whether the individual has maintained a good tenant history before and/or after the conviction;
- Whether there is evidence of rehabilitation efforts, including satisfactory compliance with all terms and conditions of parole and/or probation; successful completion of parole, probation, mandatory supervision, or post release community supervision; and
- Other conduct demonstrating rehabilitation, such as maintenance of steady employment.

9 | May a housing provider rely on third parties to perform criminal history checks?

Yes. However, it is not a defense for a housing provider to have relied on a third party's criminal history report if the use of the criminal history violates fair housing laws, and such third parties are also subject to California's fair housing laws. Housing providers that rely on criminal histories prepared by third parties, such as consumer reporting agencies, may wish to seek from the third party details on any criminal records discovered so that the housing provider can make a lawful, individualized assessment. Furthermore, other laws limit the extent to which consumer reporting agencies can report such information.

It is unlawful for these agencies to report records of an applicant's arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, are more than seven years old (California Civil Code section 1785.13).

■ Where can I obtain more information?

Please see our website at www.dfeh.ca.gov for more information and resources.